(4)

No. 03-1274

Supreme Court, U.S.
FILED
MAR 30 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK G. FITZGERALD, CORTES DeRUSSY, and ROBIN BROOKS,

Petitioners,

v.

EDWARD D. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; JOSEPH ZARRIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; CHARMER INDUSTRIES, INC.; PREMIER BEVERAGE COMPANY LLC; PEERLESS IMPORTERS, INC.; LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; EBER BROTHERS WINE AND LIQUOR CORP.; METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
LANCE J. GOTKO
1633 Broadway
New York, NY 10019
(212) 833-1100

INSTITUTE FOR JUSTICE
CLINT BOLICK*
WILLIAM H. MELLOR
STEVEN M. SIMPSON
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

THE COURT SHOULD REVIEW THE SECOND CIRCUIT'S SUPERFICIAL REJECTION OF THE PRIVILEGES AND IMMUNITIES CLAIM.

Petitioners are delighted that both respondents, the State and liquor distributors, support review of the Commerce Clause holding of the Second Circuit. However, they oppose review of the Second Circuit's cursory rejection of petitioners' Privileges and Immunities claim, arguing that there is no split in authority among the circuits.

Actually, there is. In reaching a result contrary to the holding below in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit underscored the independent vitality of the Privileges and Immunities Clause. The state liquor administrator argued that the 21st Amendment provides an exemption to the Commerce Clause. Rejecting that contention, the Fifth Circuit found,

> Accepting arguendo the Administrator's premise, there remains a colorable claim that the provisions of the [Texas direct interstate wine shipment prohibitions] are unconstitutional under the Privileges and Immunities Clause. . . . As amici [petitioners here] have pointed out, the Privileges and Immunities Clause compliments the Commerce Clause in preventing "economic Balkanization," by intending "to place the citizens of each State upon the same footing as citizens of other States." [Citations omitted.] Texas's economically discriminatory regulations against out-of-state wineries clearly violate the "substantial equality" in fundamental rights that is secured, under the Constitution, to all citizens of different states. [Citation omitted.] . . . We need not reach this issue to dispose of this case. . . .

> Nevertheless, this shows how the Administrator's position is constitutionally infirm even if we agreed with his defense [under the Commerce Clause].

Id. at 403 n.67.

As we have argued, the Privileges and Immunities issue is important because the 21st Amendment limits the Commerce Clause but not the Privileges or Immunities Clause. It makes no sense, from the standpoint of judicial economy or justice, to review the first claim but not the second. Were the Court to rule against petitioners on the first claim, the second would remain, protracting litigation and delaying justice. Moreover, it would be illogical to interpret the first constitutional provision in a way that would permit state action that is impermissible under the second. The courts that have failed to consider the latter claim have done so only because they concluded that the state's action is unconstitutional under the Commerce Clause (or the Privileges and Immunities claim wasn't raised). Much as petitioners would welcome such a result in this case, the Court should have before it all relevant constitutional issues. Given that both claims were presented here on cross-motions for summary judgment, this case presents the Court with an opportunity to resolve all constitutional issues, and thus render a definitive decision on the constitutionality of discriminatory and protectionist barriers to direct interstate shipping of wine.

CONCLUSION

Petitioners respectfully urge the Court to accept for review both questions presented in the petition.

Respectfully submitted,

INSTITUTE FOR JUSTICE
CLINT BOLICK*
WILLIAM H. MELLOR
STEVEN M. SIMPSON
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
LANCE J. GOTKO
1633 Broadway
New York, NY 10019
(212) 833-1100

Counsel for Petitioners

**Counsel of Record*